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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 RALPH COUNTRYMAN, ) 3:10-cv-00107-LRH (WGC)  
9 Plaintiff, ) **REPORT AND RECOMMENDATION**  
10 vs. ) **OF U.S. MAGISTRATE JUDGE**  
11 STATE OF NEVADA, et. al. )  
12 Defendants. )  
13

14 This Report and Recommendation is made to the Honorable Larry R. Hicks, United  
15 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant  
16 to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is  
17 Defendants' Motion for Summary Judgment (Doc. # 52.)<sup>1</sup> Plaintiff opposed (Doc. #65) and  
18 Defendants have replied (Doc. # 66). Also before the court is Plaintiff's Cross-Motion for  
19 Summary Judgment. (Doc. 54.) Defendants opposed (Doc. # 61) and Plaintiff replied (Doc.  
20 # 64). After a thorough review, the court recommends that Defendants' motion be granted, and  
21 Plaintiff's motion be denied.

22 **I. BACKGROUND**

23 At all relevant times, Plaintiff Ralph Countryman was an inmate in custody of the  
24 Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 8) at 1.) Plaintiff, a *pro se*  
25 litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Brian Williams,  
26 Cheryl Burson, David Magnum, and Susan Stewart. (See Screening Order (Doc. # 7); Docs.  
27 # 29, # 30.)

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<sup>1</sup> Refers to court's docket number.

1 Plaintiff's remaining claims are a retaliation claim in Count I and a due process claim  
 2 in Count II. (See Docs. # 29, # 30.) In Count I, Plaintiff alleges that defendants Stewart,  
 3 Burson, and Magnum retaliated against him by convicting him of a disciplinary violation and  
 4 putting him in disciplinary segregation for pursuing civil litigation. (Doc. # 8 at 5-7.) He asserts  
 5 that after Plaintiff sent a letter complaining about Deputy Attorney General Stewart's conduct  
 6 in two civil actions filed by Plaintiff, he was convicted of a disciplinary action for threats,  
 7 unauthorized use of mail and unauthorized contact with an officer of the court. (*Id.* at 5.) As  
 8 a result of this conviction, Plaintiff alleges that he was sentenced to 120 days in disciplinary  
 9 segregation. (*Id.* at 6.) He asserts that this action was taken in retaliation for his participation  
 10 in civil litigation. (*Id.*) Plaintiff claims that defendant Burson "bullied" Plaintiff into requesting  
 11 protective segregation. (*Id.*) In addition, he avers that defendant Williams refused to overturn  
 12 his disciplinary conviction. (*Id.* at 7.)

13 In Count II, Plaintiff alleges that Defendants violated his Fourteenth Amendment due  
 14 process rights by convicting him of a disciplinary violation and placing him in disciplinary  
 15 segregation in connection with the events described in Count I. (*Id.* at 8-9.) Plaintiff asserts  
 16 that his disciplinary conviction was not supported by some evidence. (*Id.*)

17 Defendants now move for summary judgment, arguing: (1) Plaintiff's retaliation claim  
 18 fails because the disciplinary action taken advanced legitimate correctional goals, was not taken  
 19 because of any protected conduct, and Plaintiff's exercise of his First Amendment rights was  
 20 not chilled; (2) Plaintiff's due process claim fails because no liberty interest was implicated in  
 21 placing Plaintiff in disciplinary segregation, and even if it were, Plaintiff received all the process  
 22 he was due; (3) Plaintiff cannot maintain damages claims against Defendants in their official  
 23 capacities; and (4) Defendants are entitled to qualified immunity. (Doc. # 52.)

24 In his Cross-Motion for Summary Judgment, Plaintiff asserts that his claims survived  
 25 screening and Defendants' Partial Motion to Dismiss. (Doc. # 54 at 2-3.) In addition, Plaintiff  
 26 includes a vague argument regarding government misconduct which does not contain a  
 27 particular reference to the allegations of this action. (*Id.* at 3.) Plaintiff then concludes that  
 28

1 there is no genuine issue as to any material fact for trial. (*Id.* at 4.)

2 **II. LEGAL STANDARD**

3 “The purpose of summary judgment is to avoid unnecessary trials when there is no  
 4 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
 5 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in  
 6 favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing  
 7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is appropriate  
 8 if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that  
 9 there is no genuine issue as to any material fact and that the movant is entitled to judgment as  
 10 a matter of law.” *Id.* (quoting Fed.R.Civ.P. 56(c)). Where reasonable minds could differ on the  
 11 material facts at issue, however, summary judgment is not appropriate. *See Anderson*, 477 U.S.  
 12 at 250.

13 The moving party bears the burden of informing the court of the basis for its motion,  
 14 together with evidence demonstrating the absence of any genuine issue of material fact.  
 15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit evidence  
 16 in an inadmissible form, only evidence which might be admissible at trial may be considered  
 17 by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c).

18 In evaluating the appropriateness of summary judgment, three steps are necessary: (1)  
 19 determining whether a fact is material; (2) determining whether there is a genuine issue for the  
 20 trier of fact, as determined by the documents submitted to the court; and (3) considering that  
 21 evidence in light of the appropriate standard of proof. *See Anderson*, 477 U.S. at 248-250. As  
 22 to materiality, only disputes over facts that might affect the outcome of the suit under the  
 23 governing law will properly preclude the entry of summary judgment; factual disputes which  
 24 are irrelevant or unnecessary will not be considered. *Id.* at 248.

25 In determining summary judgment, a court applies a burden shifting analysis. “When  
 26 the party moving for summary judgment would bear the burden of proof at trial, ‘it must come  
 27 forward with evidence which would entitle it to a directed verdict if the evidence went

1 uncontested at trial.'[ ] In such a case, the moving party has the initial burden of  
 2 establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R.*  
 3 *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal  
 4 citations omitted). In contrast, when the nonmoving party bears the burden of proving the  
 5 claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence  
 6 to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the  
 7 nonmoving party failed to make a showing sufficient to establish an element essential to that  
 8 party's case on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at  
 9 323-25. If the moving party fails to meet its initial burden, summary judgment must be denied  
 10 and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress &*  
 11 *Co.*, 398 U.S. 144, 160 (1970).

12 If the moving party satisfies its initial burden, the burden shifts to the opposing party  
 13 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*  
 14 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
 15 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
 16 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the  
 17 parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
 18 *Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The  
 19 nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations  
 20 that are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions  
 21 and allegations of the pleadings and set forth specific facts by producing competent evidence  
 22 that shows a genuine issue for trial. *See Fed.R.Civ.P. 56(e); Celotex*, 477 U.S. at 324.

23 At summary judgment, a court's function is not to weigh the evidence and determine the  
 24 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
 25 While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be  
 26 drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not  
 27 significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations  
 28

1 omitted).

2 **III. DISCUSSION**

3 **A. COUNT I- FIRST AMENDMENT RETALIATION**

4 **1. Retaliation standard**

5 A plaintiff may state a claim for violation of his or her First Amendment rights due to  
 6 retaliation under 42 U.S.C. § 1983. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such  
 7 a claim consists of five elements: “(1) An assertion that a state actor took some adverse action  
 8 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action  
 9 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not  
 10 reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68  
 11 (9th Cir. 2005) (citations omitted); *see also Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir.  
 12 2009) (quoting *Rhodes*, 408 F.3d at 567-68). Retaliation claims must be evaluated in light of  
 13 the deference that must be accorded to prison officials. *See Pratt*, 65 F.3d at 807.

14 The inmate must (1) submit evidence, either direct or circumstantial, to establish a link  
 15 between the exercise of constitutional rights and the allegedly retaliatory action, and  
 16 (2) demonstrate that his or her First Amendment rights were actually chilled by the alleged  
 17 retaliatory action. *Pratt*, 65 F.3d at 806-07. Timing of the events surrounding the alleged  
 18 retaliation may constitute circumstantial evidence of retaliatory intent. *See Soriano’s Gasco,*  
 19 *Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). The Ninth Circuit has recognized that  
 20 prisoners have a fundamental First Amendment right to file prison grievances and pursue civil  
 21 rights litigation, and “because purely retaliatory actions taken against a prisoner for having  
 22 exercised those rights necessarily undermine those protections, such actions violate the  
 23 Constitution quite apart from any underlying misconduct they are designed to shield.” *Rhodes*,  
 24 408 F.3d at 567 (citation omitted).

25 A plaintiff’s mere speculation that there is a causal connection is not enough to raise a  
 26 genuine issue of material fact. *See Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82  
 27 (9th Cir. 1996) (“mere allegation and speculation do not create a factual dispute for purposes

1 of summary judgment") (citation omitted).

2 **2. Analysis**

3 First, Defendants assert that Plaintiff's claim fails because the disciplinary conviction  
 4 and resulting placement in disciplinary segregation was in furtherance of the legitimate prison  
 5 goal of preventing inmates from and disciplining them for threatening and harassing behavior.  
 6 (Doc. # 52 at 7-8.) Additionally, Defendants argue that Plaintiff cannot show his First  
 7 Amendment rights were actually chilled as a result of the disciplinary action taken against him.

8 Plaintiff argues that factual issues exist as to: (1) whether defendant Stewart followed  
 9 proper procedure before seeking sanctions against Plaintiff pursuant to Nevada Revised Statute  
 10 209.451 or whether her actions prove she knowingly sought to violate Plaintiff's rights; and (2)  
 11 whether Defendants' actions chilled Plaintiff's First Amendment rights. (Doc. # 65 at 3.)

12 The court finds that summary judgment should be entered in favor of Defendants and  
 13 against Plaintiff with respect to Plaintiff's First Amendment retaliation claim.

14 Preliminarily, the court finds that whether or not defendant Stewart followed proper  
 15 procedure before seeking sanctions against Plaintiff pursuant to Nevada Revised Statute  
 16 209.451 is irrelevant to this action. At issue is whether: (1) Defendants took disciplinary action  
 17 against Plaintiff *because of* his involvement in civil litigation; (2) whether such action chilled  
 18 the exercise of Plaintiff's First Amendment rights; and (3) whether it reasonably advanced a  
 19 legitimate correctional goal.

20 There is absolutely no evidence before the court to suggest that the disciplinary action  
 21 instituted against Plaintiff was taken for any reason other than to advance the legitimate  
 22 correctional goal of preventing inmates from engaging in harassing or threatening behavior.  
 23 Moreover, while Plaintiff concludes that a factual issue exists as to whether his First  
 24 Amendment rights were chilled as a result of this disciplinary action, he has presented no  
 25 evidence to create a genuine issue of material fact on this issue. He does not even make an  
 26 argument, let alone provide specific evidence, to demonstrate how his First Amendment rights  
 27 were chilled. Plaintiff has failed to raise a genuine issue of material fact in order to preclude the

1 entry of summary judgment in Defendants' favor. Therefore, summary judgment should be  
 2 granted in Defendants favor as to Count I.

3 **B. COUNT II- FOURTEENTH AMENDMENT DUE PROCESS**

4 **1. Standard**

5 While, “[l]awful imprisonment necessarily makes unavailable many rights and privileges  
 6 of the ordinary citizen,” “[p]risoners may [ ] claim the protections of the Due Process Clause.”  
 7 *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). To that end, the Fourteenth Amendment  
 8 prohibits the deprivation of “any person of life, liberty, or property, without due process of  
 9 law.” U.S. Const, amend. XIV. Those who seek to invoke due process protections must establish  
 10 one of these interests are at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). A liberty  
 11 interest may arise from either of two sources: the due process clause or state law. *Id.* at 221.

12 First, under the Constitution itself, a liberty interest is implicated when the conditions  
 13 of confinement “[exceed] the sentence in such an unexpected manner so as to give rise to  
 14 protection by the Due Process Clause of its own force.” *Sandin v. Conner*, 515 U.S. 472, 484  
 15 (1985).

16 Second, “a liberty interest in avoiding particular conditions of confinement *may* arise  
 17 from state policies or regulations, subject to the important limitations set forth in [*Sandin*.]”  
 18 *Wilkinson*, 545 U.S. at 222 (internal citation omitted). Under *Sandin*, liberty interests created  
 19 by the state are generally limited to those that “impose atypical and significant hardship on an  
 20 inmate in relation to the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 484. To  
 21 determine whether a restraint imposes “atypical and significant hardship,” a court considers  
 22 a condition or combination of conditions or factors on a case by case basis, rather than invoking  
 23 a single standard. *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003); *see also Ramirez*  
 24 *v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (citation omitted). Although there is no single  
 25 standard for determining whether a prison hardship is atypical and significant, in *Sandin*, the  
 26 Supreme Court cited three factors that provide a helpful framework: (1) whether the challenged  
 27 condition mirrored those conditions imposed upon inmates in administrative segregation and

1 protective custody, and thus comported with the prison's discretionary authority; (2) the  
 2 duration of the condition, and the degree of restraint imposed; and (3) whether the state's  
 3 action will invariably affect the duration of the prisoner's sentence. *Sandin*, 515 U.S. at 486-87.

4       In *Sandin*, the Supreme Court concluded that the disciplinary segregation imposed was  
 5 not atypical and significant and therefore did not implicate a liberty interest because: (1) it  
 6 mirrored the conditions of administrative segregation and protective custody; (2) placing the  
 7 plaintiff in disciplinary segregation for thirty days did not disrupt his environment; and (3) it  
 8 did not affect the duration of his sentence. *Sandin*, 515 U.S. at 485-87.

9       Assuming a plaintiff can demonstrate a life, liberty or property interest, the court must  
 10 then determine what process was due and whether that process was afforded the plaintiff.

11       "[T]he fact that prisoners retain rights under the Due Process Clause in no way implies  
 12 that these rights are not subject to restrictions imposed by the nature of the regime to which  
 13 they have been lawfully committed." *Wolff*, 418 U.S. at 556 (citations omitted). "Prison  
 14 disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights  
 15 due a defendant in such proceedings does not apply." *Id.* (citation omitted). In other words,  
 16 while "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for  
 17 crime," *id.* at 555, his interest in due process "must be accommodated in the distinctive setting  
 18 of a prison" in order to "[assure] the safety of inmates and prisoners, [avoid] burdensome  
 19 administrative requirements that might be susceptible to manipulation, and [preserve] the  
 20 disciplinary process as a means of rehabilitation." *Superintendent, Massachusetts Correctional  
 Institution, Wapole v. Hill*, 472 U.S. 445, 454-55 (1984) (citations omitted).

22       When an inmate faces disciplinary charges, due process requires that the inmate receive:  
 23 (1) written notice of charges; (2) at least twenty-four (24) hours between the time the prisoner  
 24 receives the written notice and the time of the hearing, so that the prisoner may prepare his  
 25 defense; (3) a written statement by the hearing officer of the evidence relied upon and the  
 26 reasons for taking disciplinary action; (4) the right of the prisoner to call witnesses in his  
 27 defense, when permitting him to do so would not be unduly hazardous to institutional safety

1 or correctional goals; and (5) legal assistance if the prisoner is illiterate or the issues presented  
 2 are legally complex. *Wolff*, 418 U.S. at 556.

3 In addition, “the requirements of due process are satisfied if some evidence supports the  
 4 decision by the prison disciplinary board.” *Superintendent*, 472 U.S. at 455 (1985); *see also*  
 5 *Wapole*, 472 U.S. at 454-55 (citations omitted); *Bruce v. Ylst*, 351 F.3d 1283, 1287-88 (9th Cir.  
 6 2003).

7 **2. Summary of argument**

8 First, Defendants argue that no liberty interest in avoiding disciplinary segregation was  
 9 implicated in this instance. (Doc. # 52 at 9.) Defendants assert that Plaintiff was sentenced to  
 10 120 days disciplinary segregation in connection with the subject disciplinary hearing. (*Id.*) They  
 11 assert that this was never carried out as Plaintiff requested and was assigned to discretionary  
 12 protective/administrative segregation where he remained until he was transferred to another  
 13 facility. (*Id.*) Moreover, Defendants assert that Plaintiff’s sentence was not affected by his  
 14 disciplinary segregation sentence. (*Id.*) Finally, Defendants assert that even if Plaintiff’s time  
 15 in segregation can be characterized as serving out his disciplinary segregation, he cannot show  
 16 that it resulted in an atypical or significant hardship. (*Id.*)

17 Second, Defendants argue that even if a liberty interest were implicated by Plaintiff’s  
 18 placement in segregated housing, the requirements of due process were satisfied as follows:  
 19 (1) Plaintiff was given written notice of the charges against him more than twenty-four hours  
 20 in advance; (2) the hearing officer issued a written statement indicating the evidence he relied  
 21 upon; (3) Plaintiff did not request and was not denied the right to call witnesses; (4) Plaintiff  
 22 indicated he was capable of representing himself; and (5) the conviction was supported by some  
 23 evidence. (Doc. # 52 at 9-10.)

24 Finally, Defendants argue that Plaintiff’s claim fails because he requested to be placed  
 25 in segregated housing. (Doc. # 52 at 10.)

26 Plaintiff asserts that he spent four months in disciplinary segregation, and eight months  
 27 in prison segregation, and that the conditions in disciplinary segregation mirror those in

1 protective segregation. (See Doc. # 65 at 2-3 ¶¶ 5-7, 11.) Plaintiff claims that he also suffered  
 2 sanctions in the form of a 45 day good time forfeiture which affected the length of his sentence.  
 3 (Doc. # 65 at 5, 11.) Finally, Plaintiff concludes that a factual issue exists as to whether the  
 4 disciplinary conviction was supported by some evidence. (Doc. # 65 at 5.)

5 **3. Analysis**

6 The court finds that Plaintiff has failed to raise a genuine issue of material fact so as to  
 7 preclude the entry of summary judgment in Defendants' favor as to the Fourteenth  
 8 Amendment due process claim set forth in Count II.

9 The Attorney General's Office received a letter from Plaintiff to Deputy Attorney General  
 10 Susan Stewart on September 12, 2007. (Doc. # 52 at 4; Doc. # 52-1 at 2; Doc. # 52-1 at 6 ¶ 3  
 11 (Stewart Decl.).) The letter stated: "If you oppose this motion I will be filing [misconduct]  
 12 charges on you and any one else you may have sucked into this little mess. And I'm not sure  
 13 what you [sic] cooking up with Chaplin Taylor but I'd hate to think that you would cause  
 14 someone to loose [sic] their job just to delay loosing [sic] a case." (Doc. # 52-1 at 2.) After  
 15 receiving the letter, Deputy Attorney General Susan Stewart sent a letter which enclosed a copy  
 16 of Plaintiff's letter to Cheryl Burson, the Associate Warden of Programs at Southern Desert  
 17 Correctional Center (SDCC). (Doc. # 52-1 at 4.) She described Plaintiff's correspondence as  
 18 "inappropriate in both its tone and content" and indicated that she was forwarding a copy to  
 19 the prison "for further action as you see appropriate." (*Id.*)

20 On September 25, 2007, Plaintiff was served a written notice of disciplinary charges  
 21 related to the letter he sent to Stewart. (Doc. # 52-1 at 8.) A disciplinary hearing on the charges  
 22 was conducted on October 2, 2007. (Doc. # 52-1 at 12-15.) Plaintiff was found guilty of the  
 23 charges of threats and harassment towards Stewart and unauthorized use of mail as the letter  
 24 was sent to Stewart via mail. (*Id.*) In finding Plaintiff guilty, the hearing officer relied on the  
 25 letter Plaintiff sent. (*Id.*)

26 Defendants have submitted a copy of the transcript from Plaintiff's disciplinary hearing.  
 27 (Doc. # 52-1 at 20-33.) Disciplinary Hearing Officer Shubert took a statement from Plaintiff.

1 (Doc. # 52-1 at 22-30, 3:17-25 thru 11.) The hearing officer then asked some questions of  
 2 Plaintiff before finding Plaintiff guilty of the charges based upon the contents of the letter.  
 3 (Doc. # 52-1 at 30-32.) Plaintiff received sanctions in the form of 120 days of disciplinary  
 4 segregation and a “stat A referral.” (*Id.*)

5 First, the court finds that the evidence before it does not implicate a liberty interest.  
 6 Plaintiff concedes that the conditions of confinement in disciplinary segregation mirrored those  
 7 in protective custody. Even if the court accepts that Plaintiff was placed in disciplinary  
 8 segregation, as opposed to protective custody, for a period of four months, he does not provide  
 9 any evidence to establish that his placement in either housing classification amounts to an  
 10 atypical and significant hardship. Moreover, while Plaintiff contends that he lost 45 days of  
 11 good time credit, he does not provide evidence to establish this was part of the sentence  
 12 imposed in connection with the subject disciplinary hearing.

13 Second, the court finds that even if a liberty interest were implicated, Plaintiff received  
 14 all the process he was due. Plaintiff does not take issue with the procedural protections outlined  
 15 for disciplinary hearings in *Wolff v. McDonnell* (which the court finds were met); instead, he  
 16 asserts that the hearing officer’s determination was not supported by some evidence.

17 “Ascertaining whether [the ‘some evidence’ standard] is satisfied does not require  
 18 examination of the entire record, independent assessment of the credibility of witnesses, or  
 19 weighing of the evidence. Instead, the relevant question is whether there is *any* evidence in the  
 20 record that *could* support the conclusion reached by the disciplinary board.” *Id.* at 455-56  
 21 (citations omitted) (emphasis added). The Court declined to adopt a more stringent  
 22 standard, reasoning, “[p]rison disciplinary proceedings take place in a highly charged  
 23 atmosphere, and prison administrators must often act swiftly on the basis of evidence that  
 24 might be insufficient in less exigent circumstances.” *Id.* at 456 (citation omitted). The Court  
 25 recognized, “[t]he fundamental fairness guaranteed by the Due Process Clause does not require  
 26 courts to set aside decisions of prison administrators that have some basis in fact.” *Id.* Courts  
 27 assessing this issue are instructed “not to make [their] own assessment of the credibility of

1 witnesses or reweigh the evidence." *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987) (citing  
 2 *Hill*, 472 U.S. at 455).

3 Here, it is clear that the hearing officer relied on the contents of the letter Plaintiff sent  
 4 to Stewart in finding him guilty of the charges. The court finds that the contents of the letter  
 5 are sufficient to constitute "some evidence" in support of the guilty determination. While the  
 6 hearing officer was also presented with Plaintiff's side of the story, the contents of the letter are  
 7 enough to support the determination. The court is not permitted to re-weigh the evidence at  
 8 this time; instead, it is tasked with deciding if there is *any* evidence in the record to support the  
 9 guilty finding. Because the guilty finding is supported by the contents of the letter, Plaintiff was  
 10 afforded due process. As a result, the court recommends that summary judgment be entered  
 11 in Defendants' favor.

12 **IV. RECOMMENDATION**

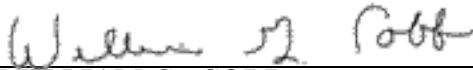
13 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order  
 14 **GRANTING** Defendants' Motion for Summary Judgment (Doc. # 52) and **DENYING**  
 15 Plaintiff's Cross-Motion for Summary Judgment (Doc. # 54).

16 The parties should be aware of the following:

17 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the  
 18 Local Rules of Practice, specific written objections to this Report and Recommendation within  
 19 fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate  
 20 Judge's Report and Recommendation" and should be accompanied by points and authorities  
 21 for consideration by the District Court.

22 2. That this Report and Recommendation is not an appealable order and that any  
 23 notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the  
 24 District Court's judgment.

25 DATED: September 18, 2012.

26   
 27 WILLIAM G. COBB  
 28 UNITED STATES MAGISTRATE JUDGE